Supreme Court, U.S.
FILED

(1)

No. 96 26

JUL 3 1996

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

ANN ZIENTEK,

Petitioner,

vs.

STATE OF NEW YORK, NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, TIMOTHY MURPHY, individually, AND JEROME SLAWEK, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT.

PETITION FOR WRIT OF CERTIORARI

GARY D. BOREK
Counsel of Record
BOREK & MUHLBAUER, P.C.
DEBORAH J. MUHLBAUER, *Of Counsel*
Attorneys for Petitioner
120 Delaware Avenue, Suite 431
Buffalo, New York 14202
Telephone: (716) 845-6666

TIMES APPELLATE PRINTING, INC.—Telephone (716) 344-2000

58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is an administrative warrant, unilaterally issued by the New York State Commissioner of Taxation and Finance pursuant to Tax Law §1141(b), equivalent to a warrant issued by a court of competent jurisdiction for purposes of the Fourth Amendment of the United States Constitution?

2. Did Respondents violate Petitioner's Fourth Amendment right to be free from unreasonable seizure where Respondents seized Petitioner's real and personal property and denied Petitioner access to her real and personal property for three months and twenty three days following the seizure, pursuant to an administrative warrant unilaterally issued by the New York State Commissioner of Taxation and Finance against another taxpayer who was not Petitioner?

3. Are the individual Respondents who executed the seizure of Petitioner's real and personal property liable to Petitioner pursuant to Title 42 U.S.C. §1983?

LIST OF PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND ORDERS ENTERED IN THE COURTS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 6

STATEMENT OF THE CASE 9

REASONS FOR GRANTING THE WRIT 15

1. THE APPELLATE DIVISION, FOURTH DEPARTMENT, FAILED TO ADDRESS THE SUBSTANTIVE ISSUE OF THE CONSTITUTIONAL VIOLATION UPON WHICH PETITIONER'S TITLE 42 U.S.C. §1983 CLAIM IS BASED IN DEFIANCE OF THIS COURT'S SEQUENCE OF ANALYSIS IN *G.M. LEASING V. UNITED STATES*, 429 U.S. 338 (1977). 15

2. THE APPELLATE DIVISION'S HOLDING THAT RESPONDENTS ARE NOT LIABLE TO PETITIONER PURSUANT TO TITLE 42 U.S.C. §1983 SHOULD BE REVERSED GIVEN THE PRIOR HOLDINGS OF THIS COURT IN *G.M. LEASING V. UNITED STATES* AND *SOLDAL V. COOK COUNTY*. 19

3. THE ISSUES DECIDED BY THE APPELLATE DIVISION ARE OF STATEWIDE, IF NOT NATIONAL, IMPORTANCE BECAUSE IT IS THE CUSTOMARY PRACTICE OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, AND ITS OFFICERS, TO SEIZE PROPERTY WITHOUT ANY PRIOR INVESTIGATION CONCERNING OWNERSHIP AND PROPERTY RIGHTS, AND TO DO SO WITHOUT OBTAINING A WARRANT OR WRIT OF ENTRY FROM A COURT OF COMPETENT JURISDICTION. 23

CONCLUSION.....**27**

APPENDIX:

Order of the Supreme Court of the State of New York, Appellate Division, December 22, 1995 .....A1

Decision of the Supreme Court of the State of New York, Appellate Division, December 22, 1995 .....A3

Order of the Supreme Court of the State of New York, County of Erie, August 8, 1994 .....A7

Order of the State of New York, Court of Appeals, Denying Motion for Leave to Appeal, April 4, 1996 .....A10

Decision of the Court of Appeals of the State of New York, April 4, 1996 .....A11

Amended Complaint, August 19, 1991.....A12

Administrative warrant issued by the Commissioner of Taxation and Finance, Filed March 8, 1989.....A23

TABLE OF AUTHORITIES

CASES

G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) ..... passim

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 18

Michigan v. Tyler, 436 U.S. 499 (1978) 22

Payton v. New York, 445 U.S. 573 (1980) 15, 20

Soldal v. Cook County, 506 U.S. 56 (1992) ..... passim

United States v. Jacobsen, 466 U.S. 109 (1984) 21

United States v. Lasanta, 978 F.2d. 1300 (2nd Cir. 1992) ... 18

STATUTES

28 U.S.C. §1257(a) 3, 4

42 U.S.C. §1983 ..... passim

N.Y. CIV. PRAC. L. & R. §5601(b)(1) 13

N.Y. CIV. PRAC. L. & R. §5602 13

RULES

N.Y. TAX LAW §1141(b) ..... passim

Sup. Ct. R. 10(c) 5

Sup. Ct. R. 13 3

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. IV ..... passim

U.S. CONST. amend. XIV, §1 ..... 4, 6, 11

PETITION FOR WRIT OF CERTIORARI

Petitioner Ann Zientek respectfully prays that this Court issue a Writ of Certiorari to review the Order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, entered on December 22, 1995, Index Number 11942, granting Respondents Jerome Slawek and Timothy Murphy summary judgment and dismissing Petitioner's Title 42 U.S.C. §1983 claim against Respondents. Petitioner's Appeal to the Court of Appeals of the State of New York was dismissed on April 4, 1996. Petitioner's Motion for Leave to Appeal to the Court of Appeals of the State of New York was denied on April 4, 1996.

OPINIONS AND ORDERS ENTERED IN THE COURTS BELOW

The Opinion of the Supreme Court of the State of New York, Appellate Division, Fourth Department was entered on December 22, 1995. The opinion is reported at 635 N.Y.S.2d 893, 1995 N.Y. App. Div. LEXIS 14094, and is reprinted in the Appendix at A3. The Order of the Appellate Division, Fourth Department is reprinted in the Appendix at A1.

The Order of the Supreme Court of the State of New York was without Opinion. The Order is not reported and is reprinted in the Appendix at A7.

The Opinion of the Court of Appeals of the State of New York was decided on April 4, 1996. The Opinion is reported at 1996 N.Y. LEXIS 1162 and is reprinted in the Appendix at A11. The Order of the Court of Appeals is reprinted in the Appendix at A10.

JURISDICTION

Petitioner seeks a Writ of Certiorari to review the December 22, 1995 final order of the Supreme Court of the State of New York, Appellate Division, Fourth Department, granting Respondents Jerome Slawek and Timothy Murphy summary judgment and dismissing Petitioner's Title 42 U.S.C. §1983 claim against Respondents. Petitioner was served, by mail, with a copy of the Order of the Appellate Division, Fourth Department, with Notice of Entry, on January 19, 1996.

Petitioner served Respondents with a Notice of Appeal to the Court of Appeals of the State of New York seeking review of the Order of the Appellate Division, Fourth Department on January 29, 1996, and filed said Notice of Appeal with the Erie County Clerk's Office on January 31, 1996. Petitioner simultaneously served Respondents with a Motion for Leave to Appeal to the Court of Appeals of the State of New York on January 29, 1996, and filed said Motion papers with the Court of Appeals for the State of New York on January 30, 1996.

On April 4, 1996, the Court of Appeals for the State of New York issued an Order and Decision which dismissed Petitioner's Appeal and denied Petitioner's Motion for Leave to Appeal. Pursuant to Rule 13 of the Rules of the Supreme Court of the United States, Petitioner is timely seeking review of the Order of the Appellate Division, Fourth Department, by Writ of Certiorari, within 90 days after entry of the Order of the Court of Appeals of the State of New York which dismissed review as of right, and denied discretionary review.

The statutory provision conferring jurisdiction on this Court is 28 U.S.C. §1257(a), which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1257(a) gives this Court jurisdiction via Writ of Certiorari to review final judgments of a highest state court "...where any title, right, privilege, or immunity is specially set up or claimed under the Constitution ...or statutes of ...the United States." Petitioner claims the right to be free from unreasonable seizure pursuant to the Fourth Amendment of the Constitution of the United States which is applicable to all states pursuant to the Fourteenth Amendment of the Constitution of the United States. Petitioner further claims rights and privileges pursuant to Title 42 U.S.C. §1983 for Respondents' violation of Petitioner's constitutional rights.

The Supreme Court of the State of New York, Appellate Division, Fourth Department has decided the federal issues involved in this case in a way that directly conflicts with decisions of this Court. Specifically, the Appellate Division found that Respondents had not violated Petitioner's Fourth Amendment right to be free from unreasonable seizure where the seizure occurred pursuant to

an administrative warrant that was unilaterally issued by the New York State Commissioner of Taxation and Finance against a debtor taxpayer who was not Petitioner. As the Appellate Division found that no constitutional violation occurred, it also found that Respondents Jerome Slawek and Timothy Murphy were not liable to Petitioner for their warrantless seizure of her real and personal property.

This Court has decided otherwise in *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) and *Soldal v. Cook County*, 506 U.S. 56 (1992). The Appellate Division's ruling fits squarely within this Court's guidelines for Writs of Certiorari contained in Rule 10 of the Rules of the Supreme Court. Rule 10(c) of the Rules of this Court states that considerations for writ of certiorari include when "a state court ... has decided an important federal question in a way that conflicts with relevant decisions of this Court."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The U.S. CONST. amend. IV states:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant portion of the U.S. CONST. amend. XIV, §1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Title 42 U.S.C. §1983 states:

> Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York State Tax Law §1141(b) states:

* * *

As an additional or alternate remedy, the tax commission may issue a warrant, directed to the sheriff of any county commanding him to levy upon and sell the real and personal property of any person liable for the tax, which may be found within his county, for the payment of the amount thereof, with any penalties and interest, and the cost of executing the warrant, and to return such warrant to the tax commission and to pay it the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the county clerk a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of

the warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. Such lien shall not apply to personal property unless such warrant is filed in the department of state. The sheriff shall then proceed upon the warrant, in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court or record and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of taxation and finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty. Upon such filing of a copy of a warrant, the tax commission shall have the same remedies to enforce the amount due thereunder as if the state recovered judgment therefor.

* * *

STATEMENT OF THE CASE

I. Factual Background

On September 6, 1990, Respondents Timothy Murphy and Jerome Slawek traveled to 12472 Broadway in Alden, New York for purposes of executing a seizure pursuant to an administrative warrant. The administrative warrant was issued by the Commissioner of Taxation and Finance pursuant to Tax Law §1141(b) against Ann Moran D/B/A Annie Pastas Pizzeria and Restaurant. (Appendix A23) There is no dispute that this administrative warrant is Respondents' sole justification for entering upon and seizing Petitioner's real and personal property. There is no dispute that Respondents failed to obtain a warrant or writ of entry from a court of competent jurisdiction. There is no dispute that the administrative warrant was issued against Ann Moran, and not Petitioner Ann Zientek.

Upon arrival, Respondents entered the premises located 12472 Broadway in Alden and informed the occupant, Ann Moran, that the premises was being seized for the nonpayment of taxes. Ann Moran immediately contacted her mother, Petitioner Ann Zientek, by telephone, who arrived at the premises shortly thereafter. Ann Zientek informed Respondents that she was the owner of both the real and personal property located on the premises and repeatedly requested that Respondents stop the execution of the warrant. Respondents refused to stop the seizure because Petitioner could not provide them with proof that she was the owner of the real and personal property. This was so even though neither had any knowledge concerning who owned the property in issue, and both knew that the administrative warrant was only issued against Ann Moran.

Respondents proceeded to have Petitioner forcibly removed from her premises by a Sheriff. (Record on Appeal, p. 55) Respondents instructed a locksmith to change all of the locks on the premises and refused to provide Petitioner with a key. (Record on Appeal, p. 55) Respondents further placed large neon orange seizure signs in the windows and doors of the premises which read as follows:

> WARNING. THIS PROPERTY HAS BEEN SEIZED FOR NONPAYMENT OF TAXES, AND IS NOW IN THE POSSESSION OF THE STATE OF NEW YORK. (The word **SEIZED** appears in large letters diagonally across the sign). ANY PERSON WHO ATTEMPTS TO TAMPER OR INTERFERE WITH THIS PROPERTY WILL BE PROSECUTED TO THE FULL EXTENT OF THE LAW.

(Record on Appeal, p. 60)

Petitioner was denied entry upon the premises and access to her personal property for three months and twenty three days following the seizure.

II. Proceedings in the Courts Below

Petitioner commenced the instant action by summons and complaint dated September 20, 1990. By way of an order to show cause, Petitioner also sought a preliminary injunction to regain possession and control of her property while this action was pending. Finally, on December 29, 1990, pursuant to a Stipulation entered into by Petitioner and Respondents, Respondents returned possession and control of the premises and the personal property to Petitioner. (Record on Appeal, p. 63)

In August of 1991, Petitioner timely amended her complaint to include her claim against Respondents pursuant to Title 42 U.S.C. §1983 resulting from Respondents' violation of Petitioner's Fourth Amendment right to be free from unreasonable seizure. (Appendix A12). After issue was joined on February 18, 1992, a two year period of discovery ensued during which Petitioner deposed all relevant witnesses to the events that occurred on September 6, 1990.

On March 15, 1994, Petitioner moved for summary judgment seeking, among other things, a judgment against Respondents Timothy Murphy and Jerome Slawek with regard to their liability to Petitioner for their violation of Petitioner's Fourth and Fourteenth Amendment rights pursuant to Title 42 U.S.C. §1983, and a declaratory judgment against Respondent New York State Department of Taxation and Finance that Petitioner was the owner of the real and personal property in issue. (Record on Appeal, p. 41) Respondents cross-motioned for summary judgment in favor of Respondents on June 8, 1994.

By Order dated August 8, 1994, without opinion, Judge Robert Whelan of the Supreme Court of the State of New York denied, without prejudice, both Petitioner's and Respondents' motions for summary judgment. (Appendix A7)[1] Petitioner appealed the Order of Justice Whelan (signed by Justice Flaherty) to the Appellate Division, Fourth Department on August 23, 1994, and Respondent's cross-appealed Justice Whelan's Order on September 6, 1994.

By Memorandum and Order dated December 22, 1995, the Appellate Division, Fourth Department

---

[1] This Order was signed by Hon. Thomas P. Flaherty, Special Term Justice.

unanimously modified the Order of the Supreme Court by granting Respondents' cross motion and dismissing Petitioner's causes of action against Respondents Jerome Slawek and Timothy Murphy, and by granting in part Petitioner's motion and granting judgment in favor of Petitioner by adjudging that Petitioner is the owner of the real property located at 12472 Broadway, Alden, New York. As modified, the remainder of the Supreme Court's Order was affirmed without costs. (Appendix A1 and A3)

In granting Respondents' motion for summary judgment and dismissing Petitioner's cause of action based on Title 42 U.S.C. §1983, the Court stated:

> Such a cause of action fails where it was objectively reasonable for defendants to believe that they were acting in a manner that did not violate plaintiff's Federally protected rights (*Higgins v. City of Oneonta*, 208 AD2d 1067, 1070, *lv denied* 85 NY2d 803; *see generally*, [25] *Van Emrik v. Chemung County Dept. of Social Servs.*, 191 AD2d 143, 147). Because the seizure was pursuant to a facially valid warrant, and plaintiff was unable to present any documentation of her ownership of the business or its contents, it was objectively reasonable for defendants to conclude that the seizure did not violate plaintiff's Fourth Amendment right to be free from unreasonable seizure. (Appendix A6).

In its Opinion, the Appellate Division failed to discuss the reasons why it determined that the administrative warrant was facially valid for purposes of the Fourth Amendment of the United States Constitution. Additionally, the Court simply misconstrued and summarily dismissed, without

discussion, Petitioner's argument that the administrative warrant was insufficient for purposes of the Fourth Amendment of the United States Constitution, by stating:

> Finally, there is no basis in the record for plaintiff's contention that the Commissioner's issuance of the warrant pursuant to Tax Law §1141(b) is unconstitutional (*see generally, Matter of United Casket Co.*, 449 F Supp 261, 265, n 3, *affd* 608 F2d 1369, *cert denied sub nom. York-Hoover Corp. v United Casket Co.*, 444 US 967). (Appendix A6).

Petitioner was served by mail with a copy of the Order of the Appellate Division, Fourth Department, with Notice of Entry, on January 19, 1996. Petitioner timely appealed the Appellate Division's Order to the Court of Appeals of the State of New York by serving Respondents with the Notice of Appeal on January 29, 1996, and filing said Notice with the Erie County Clerk's Office on January 31, 1996. This appeal was taken as of right pursuant to N.Y. CIV. PRAC. L. & R. §5601(b)(1) because Petitioner was appealing an order of the Appellate Division which finally determined an action where there is directly involved the construction of the Constitution of the United States. Concurrently, on January 29, 1996, Petitioner also served Respondents with a Notice of Motion for Leave to Appeal to the Court of Appeals pursuant to N.Y. CIV. PRAC. L. & R. §5602, and filed said motion with the Court of Appeals on January 30, 1996.

By Decision and Order dated April 4, 1996, the Court of Appeals, on its own motion, dismissed, without costs, Petitioner's appeal pursuant to CPLR §5601(b)(1) upon the ground that no substantial constitutional question is directly involved, and further ordered that Petitioner's Motion for

Leave to Appeal was denied with one hundred dollars costs and necessary reproduction disbursements. (Appendix A10 and A11).

Petitioner has timely filed a petition for Writ of Certiorari to this Court seeking a review of the Appellate Division, Fourth Department's dismissal of Petitioner's Title 42 U.S.C. §1983 cause of action against Respondents Timothy Murphy and Jerome Slawek for their warrantless seizure of Petitioner's real and personal property.

REASONS FOR GRANTING THE WRIT

1. The Appellate Division, Fourth Department, failed to address the substantive issue of the constitutional violation upon which Petitioner's Title 42 U.S.C. §1983 claim is based in defiance of this court's sequence of analysis in *G.M. Leasing v. United States*, 429 U.S. 338 (1977).

This Court has held that the valid warrant requirement of the Fourth Amendment of the United States Constitution is not satisfied by the existence of a general tax warrant.

> Indeed one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants or writs of assistance.

G.M. Leasing at 355. This Court has further held that:

> A valid warrant, as required by the Fourth Amendment, must be based on probable cause, must be issued by a Court of competent jurisdiction, and must particularly describe the place to be searched and the things to be seized. A search or seizure without a warrant is presumptively unreasonable.

Payton v. New York, 445 U.S. 573 (1980), at 586.

In *G.M. Leasing*, this Court unanimously reversed a decision of the Court of Appeals that had held that I.R.C. §6331 authorized the collection of taxes, by any means,

including warrantless seizures. In doing so, this Court rejected the government's arguments that (1) there is a broad exception to the Fourth Amendment that allows warrantless intrusions into privacy in the furtherance of enforcement of the tax laws, and (2) that warrantless searches are justified by congressional enactment. In doing so, this Court found that neither the history of the common law and the laws in several states prior to the adoption of the Bill of Rights, nor case law since that time, justified creation of a broad exception to the warrant requirement for intrusions in furtherance of tax enforcement.

In the case at bar, there is no dispute that the only basis for Respondents' seizure of Petitioner's real and personal property was the Commissioner of Taxation and Finance's issuance of a general warrant pursuant to New York Tax Law §1141(b) against Petitioner's daughter, Ann Moran. There is no dispute that Respondent's never obtained a warrant or writ of entry from a court of competent jurisdiction prior to their seizure of Petitioner's property. There is no dispute that there were no liens or tax warrants filed against Petitioner when Respondents seized her property. There is no dispute that Petitioner vehemently refused to consent to the seizure of her real and personal property.

Given the above, Petitioner asserts that Respondents perpetrated a warrantless seizure of her real and personal property, without probable cause. Petitioner further asserts that without her consent or a judicial warrant, the search was unreasonable and in violation of her Fourth Amendment rights.

The Appellate Division's decision in this case effectively created a judicial exception to the Fourth Amendment as it applies to state taxation officers, that this

Court flatly rejected in *G.M. Leasing* as to federal taxation officers. Thus, had this case involved both a federal and state tax liability, *G.M. Leasing* requires the federal agents to stand outside of Petitioner's premises awaiting a warrant from a court of competent jurisdiction, while the Appellate Division's decision allows state agents to walk right past the federal officers and into the premises without a warrant. This judicially created double standard is abhorrent to both the Constitution of the United States and the supremacy of the decisions of this Court.

The Appellate Division never addressed the substantive issue of the constitutional violation upon which Petitioner's Title 42 U.S.C. §1983 claim is based. In closest proximity, the Appellate Division stated that it found "no basis in the record for Plaintiff's contention that the Commissioner's issuance of the warrant pursuant to Tax Law §1141(b) is unconstitutional." However, Petitioner never sought such a ruling from that Court. Rather, Petitioner contends that it was Respondents' execution of the administrative warrant against Petitioner, rather than the Commissioner's issuance of the warrant against Ann Moran, that resulted in the constitutional violation. *See Petitioner's Amended Complaint at Appendix A12, Fourth Cause of Action, beginning at Appendix A18.*

Petitioner raises no objection to the Commissioner's right to issue a warrant pursuant to Tax Law §1141(b) that exists as a valid lien and judgment against the real and personal property of any debtor taxpayer, in this case, Ann Moran. However, just because the Legislature of the State of New York refers to this particular type of lien or judgment as a "warrant" doesn't make it one for purposes of the Fourth Amendment of the United States Constitution. Neither the Commissioner of Taxation and Finance nor the New York Legislature has the authority to grant an administrative agency

the right to search and/or seize property in violation of the Fourth Amendment of the United States Constitution, and the dictates of this Court.[2]

The Appellate Division's failure to first address the substance of the issue upon which Respondents' potential liability is based was erroneous and clearly in conflict with established federal law. Although this Court declined to decide the petitioner's Title 42 U.S.C. §1983 claim in *G.M. Leasing*, it is clear from this Court's sequence of analysis in *G.M. Leasing* that immunity under Title 42 U.S.C. §1983 can only be determined within its proper framework, i.e. after a Court has determined whether a constitutional violation has occurred so as to allow that Court to then analyze the reasonableness of Respondent's actions given the established violation. If this were not the case, this Court could have simply accepted the Court of Appeals determination in *G.M. Leasing* that Respondents' actions were not malicious and found in favor of Respondents on Petitioner's Title 42 U.S.C. §1983 claim, without ever addressing the issue of constitutional violation.

Given the above, the Appellate Division's failure to first address the substance of the issue upon which Petitioner's Title 42 U.S.C. §1983 claim is based was clearly

---

[2] In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court rejected a similar argument by a cable television operator to justify its occupation of a landlord's property under New York Executive Law §828(1) by finding that the Legislature of the State of New York could not authorize a violation of constitutionally protected rights. In *United States v. Lasanta*, 978 F.2d. 1300 (2nd Cir. 1992), the Court of Appeals for the Second Circuit similarly rejected the United States' argument that a civil-forfeiture statute represents congress' considered exemption of the executive branch from the strictures of the Fourth Amendment by rejecting, out of hand, the government's argument that congress can conclusively determine the reasonableness of warrantless seizures.

in conflict with this Court's holding in *G.M. Leasing*. Accordingly, Writ of Certiorari should be granted to allow this Court to address the substance of Petitioner's claim against Respondents, and to clarify the applicability of federal law as it relates to state taxation agencies and officers.

2. The Appellate Division's holding that Respondents are not liable to Petitioner pursuant to Title 42 U.S.C. §1983 should be reversed given the prior holdings of this court in *G.M. Leasing v. United States* and *Soldal v. Cook County*.

Thirteen years prior to the seizure in the instant case, this Court held that the warrantless seizure of a debtor taxpayer's books and records involved intrusion into the privacy of petitioner's offices in violation of the taxpayer's constitutional rights. This was so even where this Court accepted the Court of Appeals' determination that the assessments and levies were valid, so finding that probable cause existed for the search and seizure.

In the case at bar, there is no dispute that Petitioner Ann Zientek had no outstanding liability to Respondents on the day of the seizure, and that Respondents conducted no investigation of ownership of either the real or personal property located at 12472 Broadway in Alden, New York prior to the seizure. This being the case, Petitioner asserts that Respondents' seizure of her real and personal property was not even based on probable cause, in further violation of Petitioner's constitutional rights.[3]

---

[3] Had Respondents applied to a court of competent jurisdiction for a warrant or writ of entry to 12472 Broadway in Alden, New York, Respondents would have been required to demonstrate, prior to the seizure, that the premises, and the assets located thereon, were properly subject to seizure. Therefore, Petitioner's entire ordeal would have been

At the lower Court, Respondents attempted to distinguish *G.M. Leasing* and other similar Fourth Amendment cases. Respondents argued that these cases weren't applicable because Respondents' actions had not resulted in a violation of Petitioner's privacy right to be free from unreasonable search as Petitioner was leasing her property to Ann Moran at the time of the seizure. However, this Court has held that the Fourth Amendment protects property even where privacy or liberty are not implicated.

In *Soldal v. Cook County*, 506 U.S. 56 (1992), this Court held that the seizure and removal of a trailer home from a trailer park violated the trailer owner's Fourth Amendment rights. In overruling the Court of Appeals for the Seventh Circuit, this Court stated:

> The Amendment protects the people from unreasonable searches and seizures of "their persons, houses, papers, and effects." This

---

avoided if Respondents had acted in a manner that was consistent with the dictates of the Fourth Amendment of the Constitution. As stated by this Court in *Payton v. New York*,

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agency.

Id. at footnote 24.

> language surely cuts against the novel holding below, and our cases unmistakably hold that the Amendment protects property as well as privacy. This much was made clear in *Jacobsen*, 466 U.S. 109, where we explained that the first clause of the Fourth Amendment protects two types of expectations, one involving 'searches,' the other 'seizures.'"

Id., at 535.

In finding in favor of the petitioner in *Soldal*, this Court found that the petitioner had established a prima facie claim under Title 42 U.S.C. §1983 because the complaint alleged that Respondents, acting under color of state law, dispossessed the petitioners of their trailer home by physically tearing it from its foundation and moving it to another lot. As this Court found that said moving of the trailer violated the petitioner's constitutional right to be free from unreasonable seizure, this Court remanded the case for further proceedings consistent with its opinion.

In the case at bar, Petitioner has established that Respondents seized her property, without her consent, without probable cause, and without a warrant issued by a court of competent jurisdiction. Respondents effectuated the seizure of Petitioner's property pursuant to a general tax warrant issued by the Commissioner of Taxation and Finance against Petitioner's daughter, Ann Moran. Thus, Petitioner has established a prima facie case that, acting under color of state law, Respondents deprived Petitioner of her Fourth Amendment right to be free from unreasonable seizure.

In addition, the Appellate Division's conclusion that Respondents' actions were objectively reasonable because on the day of the seizure Petitioner could not produce proof of

her ownership of her real and personal property, was erroneous as a matter of law. In finding for Respondents on this ground, the Appellate Division effectively shifted the burden of the Fourth Amendment to Petitioner by requiring Petitioner to demonstrate that Respondents were not entitled to seize her property. Such a shift of the burden of probable cause required by the Fourth Amendment completely obliterates the protection it affords to all citizens. Clearly, the Fourth Amendment unambiguously dictates that it is the person or agency who claims a right of seizure who must demonstrate entitlement to such.[4]

Given the above, Petitioner asserts that Respondents had no objectively reasonable basis for believing (1) that the administrative warrant issued against Ann Moran was a sufficient legal basis for seizing property owned by Petitioner, (2) that any administrative warrant not issued by a Court of competent jurisdiction was sufficient for purposes of the Fourth Amendment, and (3) that Petitioner's claims of

---

[4] The very purpose of the Fourth Amendment is to protect citizens from unjustifiable intrusiveness of government and to guarantee that a person confronted with a search or seizure of his or her property by a government officer shall be provided with sufficient information regarding the lawfulness of the officer's actions. As stated by this Court in *Michigan v. Tyler*, 436 U.S. 499 (1978),

> When the inspector demands entry (without a warrant), the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. Thus, a major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry's legality.

Id., at 508.

ownership were unfounded. This Court should grant Writ of Certiorari because the Appellate Division's dismissal of Petitioner's Title 42 U.S.C. §1983 claim against Respondents was improperly founded on the erroneous finding, as more fully detailed in the prior section, that no constitutional violation occurred, and on the further erroneous finding, as more fully detailed in this section, that Respondents' actions were objectively reasonable.

3. The issues decided by the Appellate Division are of statewide, if not national, importance because it is the customary practice of the New York State Department of Taxation and Finance, and its officers, to seize property without any prior investigation concerning ownership and property rights, and to do so without obtaining a warrant or writ of entry from a court of competent jurisdiction.

Writ should be granted in the instant case because it is the customary practice of the New York State Department of Taxation and Finance, and its officers, to seize property without first conducting any investigation as to the ownership of the property to be seized. It is also the common practice of the Department of Taxation and Finance to do so without first obtaining a warrant or writ of entry from a court of competent jurisdiction.

In the lower Courts, Respondents repeatedly asserted that they had not violated Petitioner's constitutional rights because they seized the property in issue pursuant to a general tax warrant unilaterally issued by the Commissioner of Taxation and Finance against the debtor taxpayer, Ann Moran. However, the tax liability of Ann Moran does not justify Respondent's warrantless seizure of Petitioner's property. Further, Respondents admitted at the lower Court

that on the day of the seizure they did not know whether Ann Moran or Petitioner owned the real and personal property in issue.

At the deposition of Respondent Jerome Slawek, taken December 18, 1992, Respondent Slawek testified as follows (Questions by Gary Borek, Answers by Respondent Jerome Slawek):

Q. And do you agree with me that a seizure occurred on September 6, 1990?
A. Based on this sheet of paper I would agree.
Q. Did you participate in the seizure?
A. Yes, sir.
Q. And I believe you had earlier stated that you had not made an investigation of the ownership of the premises before you proceeded with the seizure?
A. No. I disagree with that.
Q. Would you explain to me what investigation, if any, you made of the ownership of the premises before the commencement of the seizure?
A. Well, the ownership was based on Ann Moran filing returns and conducting business there.
Q. Mr. Slawek, are you familiar with the distinction between real property and personal property?
A. Yes, sir. I would assume I would be.
Q. Did you make any investigation of the ownership of the real property located at 12472 Broadway in Alden, New

York prior to the time you commenced the seizure?

A. No, sir.

Q. Did you make any investigation of the ownership of the personal property located on the premises at 12472 Broadway, Alden, New York prior to the commencement of the seizure?

A. No, sir.

(Record on Appeal, p. 214-215) Further, in his Affidavit in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross Motion for Summary Judgment, Donald Denny, Tax Compliance Manager of the Department of Taxation and Finance, stated:

> As a Tax Compliance Manager, I have been involved in hundreds of seizures of businesses and business assets in connection with the enforcement of Tax Warrants issued for the non-payment of taxes. The procedures followed by Tax Compliance Agents Slawek and Murphy in the instant case were in all ways proper and authorized under New York State law.

(Record on Appeal, p. 119-120)

It is clear from the proceedings below that Respondents had neither the legal justification nor even a reasonable basis for seizing Petitioner's property. It is also undisputed that, far from rectifying the matter immediately by returning the property to Petitioner once the mistake was discovered, Respondents maintained exclusive possession and control of Petitioner's real and personal property for almost four months following the seizure. Given the above, there

can be little doubt that the implications of the Appellate Division's decision are staggering, and the potential constitutional violations which will result therefrom are infinite, given the arrogant position maintained by Respondents in the instant case.

This Court should grant Writ of Certiorari not only to rectify the egregious wrong suffered by Petitioner individually, but also to protect the property and privacy rights of all citizens of the State of New York. Without the requirement that a seizure occur only after Respondents have demonstrated probable cause before a neutral and detached magistrate, the constitutional rights of all innocent citizens are at risk.

CONCLUSION

For the foregoing reasons, Petitioner Ann Zientek submits that the questions presented by this Petition are substantial and merit review by this Court.

Respectfully submitted,

GARY D. BOREK
Counsel of Record
BOREK & MUHLBAUER, P.C.
DEBORAH J. MUHLBAUER, *Of Counsel*
Attorneys for Petitioner
120 Delaware Avenue, Suite 431
Buffalo, New York 14202
Telephone: (716) 845-6666

Dated: July 1, 1996

APPENDIX

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

(Entered December 22, 1995)

SUPREME COURT OF THE STATE OF
NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

1547

PRESENT: GREEN, *J. P.*, LAWTON, FALLON, DOERR AND BALIO, *JJ.*

ANN ZIENTEK,

Appellant-Respondent,

V

STATE OF NEW YORK, NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, TIMOTHY MURPHY, INDIVIDUALLY, AND JEROME SLAWEK, INDIVIDUALLY,

Respondents-Appellants.

The above named Ann Zientek having appealed to this Court from certain parts of the order of the Supreme Court, entered in the Erie County Clerk's office on August 9, 1994, and State of New York, New York State Commissioner of Taxation and Finance, Timothy Murphy, individually, and Jerome Slawek, individually, having appealed from certain parts of said order, and said appeals having been argued by Gary Borek of

counsel for appellant-respondent, Ralph Visano of counsel for respondents-appellants, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be and the same hereby is unanimously modified on the law by granting defendants' cross motion and dismissing plaintiff's causes of action against the individual defendants and by granting in part plaintiff's motion and granting judgment in favor of plaintiff as follows:

> It is ADJUDGED AND DECLARED, That plaintiff is the owner of the real property located at 12472 Broadway, Alden, New York,

and as modified the order is affirmed without costs.

Memorandum that is hereby made a part hereof.

Entered: December 22, 1995 CARL M. DARNALL,
Clerk

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said* (SEAL) *Court at the City of Rochester, New York, this DEC 22 1995*

s/ CARL M. DARNALL
Clerk.

DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

(Filed December 22, 1995)

SUPREME COURT OF THE STATE OF
NEW YORK APPELLATE DIVISION:
FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED
DECEMBER 22, 1995

HON. M. DOLORES DENMAN, *PRESIDING JUSTICE*
HON. SAMUEL L. GREEN
HON. ELIZABETH W. PINE
HON. JOHN F. LAWTON
HON. LEO J. FALLON
HON. RICHARD C. WESLEY
HON. JOHN J. CALLAHAN
HON. JOHN H. DOERR
HON. JOHN P. BALIO
HON. REUBEN K. DAVIS
HON. DAVID O. BOEHM, *ASSOCIATE JUSTICES*

CARL M. DARNALL, *Clerk*

* * *

[23] 1547. (Erie Co.)—ANN ZIENTEK, APPELLANT-RESPONDENT, V STATE OF NEW YORK, NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, TIMOTHY MURPHY, INDIVIDUALLY, AND JEROME SLAWEK, INDIVIDUALLY, RESPONDENTS-APPELLANTS.—Order unanimously modified on the law and as modified affirmed without costs [24] and

judgment granted in accordance with the following Memorandum: Supreme Court should have granted the motion of the plaintiff for partial summary judgment insofar as plaintiff sought a declaration that she is the owner of the real property located at 12472 Broadway in Alden, New York. Consequently, we modify the court's order by granting in part plaintiff's motion and granting judgment in favor of plaintiff declaring that she is the owner of that property.

The court also should have granted the cross motion of defendants for summary judgment dismissing plaintiff's causes of action against the individual defendants based upon their affirmative defense of qualified immunity. The record, viewed in the light most favorable to plaintiff, establishes that, on September 6, 1990, tax compliance agents (defendants) went to the premises located at 12472 Broadway to execute a tax warrant issued by the Commissioner of the New York State Department of Taxation and Finance (Commissioner). That facially valid warrant was issued against the debtor, Ann J. Moran d/b/a Annie Pasta's Pizzeria and Restaurant (the business), for her failure to pay taxes. Defendants proceeded to the address of the business, found the debtor there and executed the warrant by levying on the business, its equipment and fixtures. Plaintiff arrived shortly after defendants executed the warrant and advised them that she was the owner of the real property and the equipment and fixtures of the business. Plaintiff requested that defendants stop the execution of the warrant. When defendants requested that plaintiff provide them with proof of her ownership of the real property, and the business or its equipment or fixtures, she was unable to provide a certificate of authority for the business (*see*, Tax Law §1134 [a] [1], [2]) or any other documentation

establishing that she owned the equipment or fixtures. Defendants, therefore, rejected plaintiff's request and seized the business, along with its equipment and fixtures.

The record further shows that the debtor owed the taxes set forth in the warrant and that she had met with defendants on a number of occasions to establish a payment schedule for the taxes. At those meetings, tax compliance agents advised the debtor that, if she failed to pay her past-due taxes, the business would be seized pursuant to the Tax Law. More importantly, plaintiff was present during one of those meetings when the debtor was advised of the possibility that the business could be seized for her failure to repay her tax debt. Because plaintiff failed to respond to defendants' assertion that she knew of the debtor's tax delinquency and that there was a possibility that defendants would seize the business, she is deemed to have admitted those facts (*see, Laye v Shepard*, 48 Misc 2d 478, 480, *affd* 25 AD2d 498). Subsequent to the seizure of the business, counsel for plaintiff provided defendants with information concerning plaintiff's claims to ownership of the equipment and fixtures located at the business. There are questions of fact concerning the validity of those claims. Thus, the court properly denied plaintiff's motion for partial summary judgment insofar as it sought a declaration that plaintiff is the owner of the equipment and fixtures at 12472 Broadway.

Public officials "are clothed with a limited immunity, while discharging their public responsibility" (*Teddy's Drive-In v. Cohen*, 47 NY2d 79, 82). Defendants in the instant case executed a facially valid warrant against the business of the debtor at 12472 Broadway. Consequently, they cannot be held personally liable to plaintiff based on her claim that she owned the contents of the business (*see Teddy's Drive-In v. Cohen, supra*, at

82). Unlike the tax compliance agent in *Teddy's Drive-In*, defendants refrained from selling the property upon receiving documentation in support of plaintiff's claim of ownership. Thus, there is no basis to support a claim that defendants acted outside the scope of their authority in executing the warrant (*cf., Teddy's Drive-In v. Cohen, supra*, at 82).

Furthermore, defendants were entitled to summary judgment dismissing plaintiff's cause of action based on 42 USC §1983 on an additional ground. Such a cause of action fails where it was "objectively reasonable for defendants to believe that they were acting in a manner that did not violate plaintiff's Federally protected rights" (*Higgins v. City of Oneonta*, 208 AD2d 1067, 1070, *lv denied* 85 NY2d 803; *see generally*, [25] *Van Emrik v. Chemung County Dept. of Social Servs.*, 191 AD2d 143, 147). Because the seizure was pursuant to a facially valid warrant, and plaintiff was unable to present any documentation of her ownership of the business or its contents, it was objectively reasonable for defendants to conclude that the seizure thereof did not violate plaintiff's Fourth Amendment right to be free from unreasonable seizures.

Finally, there is no basis in the record for plaintiff's contention that the Commissioner's issuance of the warrant pursuant to Tax Law §1141 (b) is unconstitutional (*see generally, Matter of United Casket Co.*, 449 F Supp 261, 265, n 3, *affd* 608 F2d 1369, *cert denied sub nom. York-Hoover Corp. v. United Casket Co.*, 444 US 967). Consequently, we grant defendants' cross motion and dismiss plaintiff's causes of action against the individual defendants. (Appeals from Order of Supreme Court, Erie County, Flaherty, J.—Summary Judgment.) PRESENT: GREEN, J. P., LAWTON, FALLON, DOERR AND BALIO, JJ. (Filed Dec. 22, 1995.)

ORDER OF THE STATE OF NEW YORK, SUPREME COURT, COUNTY OF ERIE

(Filed August 9, 1994)
(Erie County Clerk's Office)
INDEX NO. 11942/90
HON. ROBERT E. WHELAN
ASSIGNED JUSTICE

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

ANN ZIENTEK,

- vs. - *plaintiff,*

STATE OF NEW YORK, NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, TIMOTHY MURPHY, individually, AND JEROME SLAWEK, individually,

defendants.

ORDER

Plaintiff in the above entitled action, have made a motion for an order pursuant to rule 3212 of the Civil Practice Law and Rules, directing that summary judgment be entered herein in favor of the plaintiff for the relief demanded in the complaint on the ground that there is no defense to the action. Defendants have made a cross-motion for an order pursuant to rule 3212 of the Civil Practice Law and Rules directing that summary judgment be entered herein in favor of Defendants for the relief demanded in the answer on the ground that Plaintiff lacks standing or in the alternative that Defendants Jerome Slawek and Timothy Murphy are entitled to qualified immunity. Plaintiff also made a

cross-motion to strike portions of Defendants' affidavits on the grounds that said portions are conclusory and improper.

NOW on reading the verified amended complaint and amended answer herein and on reading and filing Plaintiff's Notice of Motion, and Motion, dated March 14, 1994, with proof of due service thereof, the affidavits of Ann Zientek, sworn to February 25, 1994, Ann Moran, sworn to March 4, 1994, and the affirmation of Gary D. Borek, dated March 15, 1994, Plaintiff's Statement of Material Facts in Support of Motion for Summary Judgment, Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, Plaintiff's Notice of Cross-Motion and Cross-Motion to Strike Porions of Defendants' Affidavits, dated June 20, 1994, and the Memorandum of Law in Support of Plaintiff's Cross-Motion to Strike Portions of Defendants' Affidavits, and Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Cross-motion for Summary Judgment, and the Affirmation of Deborah J. Muhlbauer in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Cross Motion for Summary Judgment, and on reading and filing Defendants' Cross-Notice of Motion for Summary Judgment, dated June 8, 1994, and the affidavit of Jerome Slawek, sworn to June 8, 1994, the affidavit of Timothy Murphy, sworn to June 8, 1994, and the affidavit of Donald Denny, sworn to June 8, 1994, Defendants' Memorandum of Law in Support of Cross-Motion for Summary Judgment, Defendant's Reply Memorandum of Law in Support of Defendants' Cross-Motion for Summary Judgment, and the affidavit of James Arnone in Opposition to Plaintiff's Cross-Motion to Strike Portions of Defendants' Affidavits, dated July

8, 1994, and after hearing Gary D. Borek, attorney for the Plaintiff, argue in support of Plaintiff's motion and cross-motion and in opposition to Defendants' cross-motion, and James Arnone, attorney for Defendants, argue in opposition to Plaintiff's motion and cross-motion and in support of Defendant's cross-Motion, and due deliberation having been had, it is

ORDERED that Plaintiff's Motion for Summary Judgment is denied without prejudice; and it is further

ORDERED that Plaintiff's Cross-Motion to Strike Portions of Defendants' Affidavits is denied without prejudice; and it is further

ORDERED that Defendants' Cross-Motion for Summary Judgment is denied without prejudice; and it is further

ORDERED that judgment be entered accordingly.

s/ THOMAS C. FLAHERTY
Hon. ~~Robert E. Whelan~~
Justice, Supreme Court
Erie County

ENTERED:

GRANTED
AUG 8, 1994
Deanne M. Menton
County Clerk

OK
PFB
8/8/94

ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS, DENYING MOTION FOR LEAVE TO APPEAL

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourth day of April 1996.

STATE OF NEW YORK
COURT OF APPEALS

PRESENT, HON. JUDITH S. KAYE,
Chief Judge, presiding.

4-14 Mo. No. 188

Ann Zientek,

Appellant,

v.

State of New York, et al.,

Respondents.

The appellant having filed notice of appeal and a motion for leave to appeal to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ STUART M. COHEN
Stuart M. Cohen
Deputy Clerk of the Court

DECISION OF THE NEW YORK STATE COURT OF APPEALS

STATE OF NEW YORK
(SEAL) COURT OF APPEALS

DONALD M. SHERAW
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION April 4, 1996

4-14 Mo. No. 188

Ann Zientek,

Appellant,

v.

State of New York, et al.,

Respondents.

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

AMENDED COMPLAINT DATED AUGUST 19, 1991

INDEX NO. 11942/90

HON. GEORGE F. FRANCIS
ASSIGNED JUSTICE

ANN ZIENTEK,

plaintiff,

- vs. -

STATE OF NEW YORK, NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, TIMOTHY MURPHY, individually, AND JEROME SLAWEK, individually,

defendants.

AMENDED COMPLAINT

The plaintiff, by her verified amended complaint, alleges:

FOR A FIRST CAUSE OF ACTION against the all defendants, that:

1. Plaintiff resides at 60 Arbour Lane, Buffalo, New York.

2. Defendant New York State maintains an office for its Department of Law at 65 Court Street, Buffalo, New York.

3. Defendant New York State Commissioner of Taxation and Finance maintains an office at 462 Washington Street, Buffalo, New York.

4. Defendant Timothy Murphy is a tax compliance agent of defendant New York State Commissioner of Taxation and Finance with a post of duty at 462 Washington Street, Buffalo, New York.

5. Defendant Jerome Slawek is a tax compliance agent of defendant New York State Commissioner of Taxation and Finance with a post of duty at 462 Washington Street, Buffalo, New York.

6. Plaintiff is the owner in fee simple of real property known locally as 12472 Broadway, in Alden, New York (the "Premises"). A copy of the plaintiff's deed to the Premises is attached as Exhibit A.

7. Plaintiff is the owner of certain equipment and fixtures (the "Equipment and Fixtures") in an about the Premises.

8. The defendants have seized the Equipment and Fixtures, are occupying the Premises, and intend to auction the Equipment and Fixtures for taxes alleged to be owing to the defendant State of New York by the plaintiff's daughter, Ann Moran.

9. Plaintiff's daughter, Ann Moran, is not the owner of the Equipment and Fixtures, and does not have possessory rights to occupy the Premises.

10. Plaintiff acquired title to the Equipment and Fixtures (which were on the Premises on January 13, 1988) pursuant to an agreement between plaintiff and her daughter, Ann J. Moran, (the "Agreement"), a copy of which is attached as Exhibit B.

11. Upon information and belief, the Agreement was prepared by Attorney William Hites, 500 Statler Towers, Buffalo, N.Y., in the course of his representation of Ann Moran in a divorce proceeding.

12. Upon information and belief, plaintiff's title to said portion of the Equipment and Fixtures was acquired before the defendants made any assessments or issued any warrants against Ann Moran. Thus, the plaintiff's title to said portion of the Equipment and Fixtures is superior to any claims of the defendants.

13. Plaintiff acquired title to the remainder of the Equipment and Fixtures by purchases from other parties over the past several years. Copies of the plaintiff's checks made in payment for several of those purchases are attached as Exhibit C.

14. The Premises were leased to Ann Moran as a month-to-month tenant from January of 1990 to August of 1990.

15. Ann Moran did not timely pay her rent for occupation of the Premises for the month of September.

16. Ann Moran has not offered to cure said default in payment of the rent, has stated that she will not cure said default, and has voluntarily relinquished her possession of the premises to the plaintiff to avoid the expense of a summary dispossess proceeding.

17. The defendants' continued occupation of the Premises against the will of the plaintiff is unlawful. The defendants' control and possession of the Equipment and Fixtures against the will of the plaintiff is unlawful. The defendants' intended sale of the Equipment and Fixtures against the will of the plaintiff is unlawful.

18. The plaintiff has no adequate remedy at law against the defendants for the harm which has and will be done if the defendants do not immediately relinquish all possession and control of the Premises and the Equipment and Fixtures to the plaintiff, free and clear of

claims and liens of the defendants, and restore the Premises and the Equipment and Fixtures to their pre-seizure condition.

19. Based on the foregoing, the plaintiff is entitled to a declaratory judgement against the defendants as to the relative rights of the parties in and to the possession, control, and title of the Premises and the Equipment and Fixtures, and the plaintiff is entitled to a preliminary injunction prohibiting the defendants from removing, disposing, damaging, wasting, or transferring title or possession, in any manner, to the Premises and the Equipment and Fixtures, and a preliminary injunction granting plaintiff access to the Premises, until such time as the relative rights of the parties are finally determined in this action.

FOR A SECOND CAUSE OF ACTION against the defendants Jerome Slawek, individually, and Timothy Murphy, individually, that:

20. The plaintiff repeats and realleges the allegations in paragraphs 1 to 19 as if fully set forth herein.

21. On or about September 6, 1990, the defendants entered upon the Premises without the permission of the Plaintiff.

22. Upon information and belief, said entry of the defendants was for the purpose of executing upon a warrant of the New York State Commissioner of Taxation and Finance issued against Ann Moran pursuant to section 1141(b) of the New York State Tax Law.

23. Upon information and belief, when defendants entered the plaintiff's premises they were acting in the capacity of a Sheriff.

24. When plaintiff became aware of said entry, she went to the Premises and informed the defendants that she was the owner of the Premises and the fixtures and equipment thereon.

25. The defendants refused to discuss her claim of ownership to the Premises and the Equipment and Fixtures.

26. The defendants instructed plaintiff to leave the premises and threatened the plaintiff with arrest if she failed to obey their orders.

27. Upon information and belief, plaintiff's attorney, Gary D. Borek, visited the defendants' office on September 19, 1990 to present evidence of the plaintiff's claim to ownership of the Premises and the Equipment and Fixtures.

28. Upon Information and belief, the defendants were presented with the original of the Agreement, the originals of several of the canceled checks set forth on Exhibit C, and other documents evidencing the plaintiff's title to the Premises, rights to possession thereof, and ownership of the Equipment and Fixtures.

29. Upon information and belief, the defendants refused to consider the plaintiff's claims of ownership when presented to them by her attorney at said meeting.

30. Upon information and belief, the plaintiff's attorney, Gary D. Borek, received a telephone call from the defendant Jerome Slawek on September 20, 1990 and Mr. Slawek stated that the defendants intended to proceed with an auction of the Equipment and Fixtures without further consideration of plaintiff's claims to ownership.

31. Upon information and belief, after his telephone conversation with defendant Jerome Slawek, the plaintiff's attorney, Gary D. Borek, called the Buffalo office of the New York State Tax Department of Taxation and Finance to discuss the plaintiff's claims with a superior of defendant Jerome Slawek. The plaintiff's attorney was directed to a Mr. Denny who told the plaintiff's attorney that the defendants would give no further consideration to the plaintiff's claims to ownership and would proceed with an auction of the Equipment and Fixtures.

32. The plaintiff has demanded that defendants return all possession and control of the Premises and the Equipment and Fixtures to the plaintiff. The Defendants have refused to comply with the plaintiff's demands.

33. The foregoing acts of the defendants amount to misfeasance for which they are personally liable.

34. The foregoing acts of the defendants amount to a wrongful conversion of, and continuing trespass upon, the plaintiff's property, damaging the plaintiff, and for which the plaintiff is entitled to recovery in the amount of $200,000.

FOR A THIRD CAUSE OF ACTION against the defendants Jerome Slawek, individually, and Timothy Murphy, individually, that:

35. The plaintiff repeats and realleges the allegations in paragraphs 1 to 34 as if fully set forth herein.

36. That the forgoing acts of the defendants were wanton, reckless, and malicious, were without justification in law or fact, were in derogation of the duties owed to plaintiff by the defendants as public

officials and representatives of the State of New York, for which the plaintiff is entitled to punitive damages in the amount of $1,000,000.

FOR A FOURTH CAUSE OF ACTION against the defendants, Jerome Slawek, individually, and Timothy Murphy, individually, that:

37. The plaintiff repeats and realleges the allegations in paragraphs 1 to 36 as if fully set forth herein.

38. Plaintiff has a right to be free from the illegal seizure of property which is secured by the Fourth and Fourteenth Amendments to the Constitution of the United States and by Title 42 U.S.C. Section 1983.

39. After plaintiff provided defendants, Jerome Slawek and Timothy Murphy with proof of her ownership of the Premise, Equipment, and Fixtures, defendants, Jerome Slawek and Timothy Murphy individually and as agents of the State of New York and New York State Commissioner of Taxation and Finance, acting in concert with each other under color and virtue of law and in their official capacities, willfully, knowingly and with specific intent, continued their entry onto the property of the plaintiff and acting for the State of New York through the New York State Commissioner of Taxation and Finance, seized the Premise, the Equipment and Fixtures owned by the plaintiff with the specific intent to deprive plaintiff of her constitutional rights guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States and by Title 42 U.S.C. Section 1983.

40. The Premise, Equipment and Fixtures owned by the Plaintiff were seized by the defendants without due process of law.

41. As a result of the foregoing, Plaintiff has been deprived of her constitutional rights and has suffered great mental anguish and emotional upset.

42. The conduct of the defendants deprived plaintiff of the following rights, privileges, and immunities secured to her by the Constitution of the United States:

A. The right to be secure in her person and effects against unreasonable search and seizure under the Fourth and Fourteenth Amendments of the Constitution of the United States;

B. The right of the plaintiff not to be deprived of life, liberty, or property without due process of law, and the right to the equal protection of the laws secured by the Fourteenth Amendment to the Constitution of the United States.

43. As a direct and proximate result of the violations of plaintiff's constitutional rights, plaintiff was made to suffer great emotional trauma, discomfort, and embarrassment, her personal and professional reputation were impaired, and she was forced to retain counsel to represent her to recover the illegally seized Premise, Equipment and Fixtures.

44. As a further and proximate result of the violations of plaintiff's constitutional rights, plaintiff was required to employ and did employ the undersigned attorney to prosecute this action.

45. Plaintiff has become obligated to pay said attorneys a reasonable fee for their services in connection with and in furtherance of this action arising out of the gross misconduct of the defendants.

WHEREFORE, the plaintiff respectfully requests:

1. That the court declare the rights and other legal relations of the parties to the Premises and the Equipment and Fixtures;

2. That the court issue a preliminary injunction prohibiting the defendants from removing, disposing, damaging, wasting, or transferring title or possession, in any manner, to the Premises and the Equipment and Fixtures, and granting plaintiff access to the Premises, until such time as the relative rights of the parties are finally determined in this action;

3. A judgment against the defendants Jerome Slawek and Timothy Murphy in the amount of $200,000 for the wrongful trespass, occupation, possession, control and conversion of plaintiff's property;

4. A judgment against the defendants Jerome Slawek and Timothy Murphy for punitive damages in the amount of $1,000,000; and

5. A judgment against the defendants Jerome Slawek and Timothy Murphy for punitive damages in the amount of $1,000,000 and an award of attorneys fees as approved for violations of rights granted to the plaintiff by the Fourth and Fourteenth amendments of the Constitution of the United States of America and by 42 U.S.C. §1983 and for such other and further relief as the Court deems just and proper.

DATED: August 19, 1991
Buffalo, New York

Yours, etc.

BOREK & TOTH, P.C.
GARY D. BOREK *of counsel*
Attorneys for Plaintiff
120 Delaware Avenue, Suite 431
Buffalo, New York 14202
(716) 845-6666

State of New York
City of Buffalo
County of Erie

Ann Zientek, being duly sworn, states that she is the plaintiff in this action and that the foregoing amended complaint is true to her own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters she believes them to me true.

s/ ANN ZIENTEK
Ann Zientek

Sworn to before me this 19th day of August, 1991.

s/ LOUIS B. TOTH, JR.
Louis B. Toth, Jr.
Notary Public, State of New York
Qualified in Erie County
My commission expires June 30, 1992

BEST AVAILABLE COPY

New York State Department of
TAXATION and FINANCE
Tax Compliance Division
65 COURT STREET
BUFFALO, N. Y. 14202

Warrant

FILED
1989 MAR -8 AM 9:25
ERIE COUNTY
CLERK'S OFFICE

Commissioner of Taxation and Finance (seal)

against

Judgment Creditor

ANN J MORAN D/B/A
ANNIE PASTAS PIZZERIA AND RESTAURANT
12472 BROADWAY
ALDEN NY 14004

Judgment Debtor

Last Known Address

E0021133

716-855-5453

MAR 08 1989

THE PEOPLE OF THE STATE OF NEW YORK TO: VINCENT TESTA an officer or employee of the Department of Taxation and Finance: WHEREAS, a tax has been found due to the Commissioner of Taxation and Finance of THE STATE OF NEW YORK imposed by Article 28 / 29 of the Tax Law from the debtor named, the nature and amount of which, together with the interest and penalties thereon, are as follows:

TAXABLE PERIOD ENDING	ASSESSMENT NO.	TAX	PENALTY	INTEREST	TOTAL
11/30/87	S881118000E	$ 12,913.04	$ 3,620.86	$ 4,720.71	$ 21,254.61
11/30/87	S881118001E	0.00	1,018.71	0.00	1,018.71
	TOTALS	12,913.04	4,639.57	4,720.71	22,273.32

AND WHEREAS, said tax, interest and penalties now remain wholly unpaid;

NOW, THEREFORE, WE COMMAND YOU to file a copy of this warrant within five days after its receipt by you in the office of the Clerk of the County of ERIE, for entry by him in the judgment docket, pursuant to the provisions of the Tax Law.

AND WE FURTHER COMMAND YOU, that you satisfy said claim of said Commissioner of Taxation and Finance for said tax with penalties and interest out of the real and personal property in said county belonging to said debtor and the debts due to him at the time when said copy of this warrant is so docketed in the office of Clerk of such county or at any time thereafter; and that only the property in which said debtor who is not deceased has an interest or the debts owed to him shall be levied upon or sold hereunder; and return this warrant and pay the money collected within sixty days after the receipt thereof to the Commissioner of Taxation and Finance of the State of New York.

WARRANT received at 9:00 o'clock A M., on

V. Testa
Name and Title of Employee
Department of Taxation and Finance

To the Officer or Employee named above:
Levy and collect $ 22,273.32 with Additional interest at 12.00 % Per Annum on $ 17,633.75 from MARCH 02, 1989 plus additional penalties as provided by law. Rate of additional interest stated may be modified pursuant to Chapter 103 of the Laws of 1981.

Issued at BUFFALO, N. Y.

By ..... Commissioner of Taxation and Finance
Deputy Tax Commissioner

12-NF-20

DTF-8.3 (rev)

WARRANT FILED MARCH 8, 1989